IN THE MATTER

OF

HUMAN RIGHTS CODE, R.S.O. 1981, C.53, as amended

AND IN THE MATTER OF The complaint made by Ms. Jacqueline Black dated January 8, 1987 alleging discrimination in employment on the basis of handicap by Gaines Pet Foods and Mr. Bill Gerber.

Board of Inquiry: Professor Graeme H. McKechnie

Appearances:

For the Human Rights Commission
Mr. Mark Hart, Counsel

Complainant
Ms. Jacqueline Black

Respondents
Gaines Pet Foods
Mr. Bill Gerber

For the Respondents
Mr. D.B. Francis, Counsel
Ms. Paulene C. Pasieka, Counsel

Jacqueline Black has complained that she was terminated from her employment at Gaines Pet Foods in January, 1986 in contravention of section 4(1) and section 8 of the Ontario Human Rights Code (Code).

> 4. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.
>
> 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

The Human Rights Commission (Commission) took the position at the outset of the proceedings, that two absences from her work precipitated the decision to dismiss the complainant and those absences were caused by, or related to, handicap, as defined in the Code. The first absence which began in November, 1984 and extended to April, 1985 was the result of treatment for cervical cancer. The second major incident occurred as a result of an automobile accident in June 1985 and there are absences related to the affects of that accident later in the year. Ms. Black suffered shoulder and neck injuries as a result of the accident. The Commission's position was stated at the outset as follows:

> "... where non-culpable absenteeism is caused by, or related to, a handicap within the meaning of the Human Rights Code, those absences related to, or caused by, that handicap must be accommodated by the employer unless to do so would cause the employer undue hardship within the meaning of the case law." (Vol 1, p. 16)

The Commission took the position that the absence related to cancer and the absence related to the neck and shoulder injuries, both constituted handicaps within the meaning of the Code. During the hearing, the Commission dropped its position that the neck and

shoulder injuries should be treated as handicaps within the meaning of the Code. (Vol 4, p. 495 and Vol 6, p. 681).

THE EVIDENCE

Ms. Black began her employment at General Foods in 1966 as a Utility Packer. Gaines Pet Foods was a division of General Foods at that time. It was the evidence of Mr. William Gerber, who had been employed by General Foods and then by Gaines Pet Foods, that the parent company sold the Gaines division in August, 1984. Both Mr. Gerber and Ms. Black were employees of Gaines Pet Foods following the sale.

The company was in the business of producing dog food and cat food in both moist and dry product forms. The Gaines Pet Food division was sold in both Canada and the United States, but to different buyers and, in Mr. Gerber's view, this made the competition much more difficult for the Canadian company. He testified that the Gaines division was losing money when it was part of General Foods and that its market share was also decreasing. Following the sale, a number of activities were undertaken in order to increase the market share, one of which was to open a head office in Toronto and another was to make the manufacturing facility more productive. Mr. Gerber stated that in 1984, the company did show a profit, but following that, sales and profit showed a downward trend. He stated that when General Foods sold the Gaines division, three foremen, and thirty-two (32) hourly rated production employees went to the new Gaines Pet Foods organization. Mr. Gerber testified that the number of production employees was established at thirty-two (32) because of a guarantee contained within the collective agreement. An employee who had ten years of seniority and 200 hours worked in the year was guaranteed one year of employment and the company wanted to have the exact number of employees needed to operate the plant, without any extras, because of this guarantee.

The new Gaines Food company inherited the collective agreement from General Foods. Jacqueline Black was a Utility Packer in the General Foods organization and at Gaines Pet Foods. She elected to move with the Gaines Pet Food division in 1984. Her foreman was Bev Davey in the Packing Room. She indicated that Mr. Gerber was in a position superior to the foreman.

Ms. Black testified that the first indications that she might have a medical problem with cancer occurred in November, 1984 when she went to her family doctor, Dr. Haukioja. Dr. Haukioja referred Ms. Black to Dr. Harris in Toronto for further tests and examinations. Following those tests, she was admitted to Sunnybrook Hospital for surgery and Dr. DePetrillo performed the necessary surgery. Dr. DePetrillo testified at the hearing that there were two basic treatments for carcinoma of the cervix. In one, surgery is required and the other form of treatment is radiation. It was decided in the case of Ms. Black that the invasive technique was required. Dr. DePetrillo testified that he has conducted research into psychosocial rehabilitation of cancer patients and has found that with cervical carcinoma, the female recognizes that she has lost the child-bearing function and that there are the possibilities of a mourning period following gynecological cancer surgery. Attendant upon this is depression for some patients. Dr. DePetrillo testified that with invasive procedures, a patient is normally seen two months after the surgery has been performed, and then every three months, for two years. He testified that the critical period for recurrence is two years rather than five years in other forms of cancer and that Ms. Black's tests, following the surgery, were all negative. Dr. DePetrillo was not cross-examined and his evidence indicates that invasive surgery can be a traumatic experience. There is no disagreement between the parties that Ms. Black was away from her job from approximately November 20, 1984 until April 26, 1985 for cancer related reasons. Although the Respondents pointed to evidence that there were some other health problems during that time, Counsel for the Respondents stated that

she would be content to treat the period as absence due to cancer of cancer related problems. (Vol 7, p. 829).

During her absence, beginning in November 1984, Ms. Black was sent a letter, dated February 26, 1985, which stated in part as follows:

> "Our records indicate that your absenteeism has been excessive when compared to the incidence of absenteeism of fellow workers." (Exhibit 4).

The letter went on to state that the company was demanding an improved attendance record and indicated that if it did not improve, termination of her employment could be the result. Mr. Tom Williams, Unit Chairman of the union, testified that a meeting was held following receipt of the letter sent to Ms. Black. Ms. Black testified that she did not recall the meeting held in February, 1985; however, Mr. Williams testified she was present. Mr. Williams testified that the letter was explained to Ms. Black and she agreed to decrease her absenteeism. He indicated that she was quite nervous and was prepared to admit to almost anything at the meeting. (Vol 2, pp. 181-182).

Ms. Black returned to work in April, 1985 and was given a letter dated April 29, 1985 and this letter is as follows:

April 29, 1985

Mrs. Jacqueline Black,
R.R. #1,
Castleton, Ontario K0K 1M0

Dear Jackie:

This is further to our letter of February 26, 1985. That letter was sent to you as a result of our concern over your record of absenteeism which has a detrimental effect

on the efficient operation of our business and upon the efficient contribution of your fellow workers.

In reviewing your past absentee record we find there is an unbroken pattern extending back many years as follows:

Year	Days Absent
1981	56
1982	77
1983	33
1984	87
1985	80 (up to April 26th)

We feel that the stage has been reached where the legitimate interests and employment bargain between yourself and Gaines Pet Foods Corp. is in serious jeopardy.

From this date on we require that the following conditions be met:

a) During the next twelve (12) months of your employment you will be expected to maintain a level of attendance equal to or better than the average for the hourly rated employees in the plant. The plant average will be calculated on a rolling 12 month basis.

b) After this period you acknowledge your responsibility to maintain a reasonable level of attendance.

Failure to meet the above requirements at any time will result in the termination of your employment.

Yours truly,

Bev Davey,
Packaging Foreman

:cd

cc: W. Gerber
Unit Chairman - Local 1230
J. Galbraith

Mr. Williams testified that a meeting was held following receipt of this letter and indicated that Ms. Black stated that she would try and do better in the matter of her attendance. Ms. Black testified that the company officials wanted her to say that she would not be sick again but she could not swear to this. She said that she would be in every day as long as she was well enough to come to work. Ms. Black also testified that she was not certain, in her own memory, about all of items that were discussed at the meeting about the conditions regarding her attendance.

In June, 1985, Ms. Black and her common law spouse, Elwood Begg were in a car accident during their vacation in New Brunswick. She saw a doctor in Nova Scotia, where members of her family resided, and missed five days of work beginning approximately June 17, 1985. She notified the company and had a doctor's letter for this absence. In November, 1985, she was under the care of a chiropractor, M. J. Hubble. She had complained of neck and shoulder injuries and Dr. Hubble indicated, in a medical certificate, that the injury was possibly related to the automobile accident. Mr. Gerber sent Ms. Black a letter dated December 12, 1985, advising her to visit Dr. T. Brown, for an assessment and Ms. Black did that. She testified that Dr. Brown examined her for a brief period of time and in her view, the examination was cursory. Dr. Brown testified and his examination in chief was accepted as Exhibit 50 which was a letter dated December 17, 1985, addressed to Mr. Gerber. Dr. Brown's letter indicated that Ms. Black appeared very healthy and that he: "...could find no objective evidence of musculo-skeletal or other problems". He stated in his letter that she was an individual who was "hypochondriacal" and then indicated that there was the, "possibility of low motivation and actual malingering." (Exhibit 50). Dr. Brown was cross-examined and indicated that although he had searched his office, he could not find the medical file of Ms. Black. He indicated in his evidence what he would have done, rather than what was actually done, in the office, because the file had been lost.

The company sent Ms. Black the following letter dated January 6, 1986 (Exhibit 6):

January 6, 1991

Mrs. Jacqueline Black,
R.R. #1,
Castleton, Ontario K0K 1M0

Dear Jackie:

This is further to our letter to you of April 29th, 1985. That letter was sent to you as a result of our concern over your record of absenteeism, which has a detrimental effect on the efficient operation of our business and upon the efficient contribution of your fellow workers. At that time, we expressed to you our concern that you might not be able to satisfactorily perform your duties in the future due to a consistent absenteeism problem.

We agreed at that time that your continued employment with Gaines would be dependent upon your absenteeism not exceeding the average for the hourly workers at any time during the next twelve months. Our records indicate the average absenteeism of your co-workers to be 6.5 days starting May 1, 1985 to date.

We note that you were absent from work June 17th to June 21st, 1985. You returned to work and then, once again, you have been absent from work since November 4th for a total of forty (40) days since our agreement.

We feel the stage has been reached where the legitimate interests of both yourself and Gaines Pet Foods Corp. require that your employment with Gaines Pet Foods Corp. be terminated. We do not feel that you will live up to your side of the employment bargain in the future.

Please take this letter as written notification that your employment with Gaines Pet Foods Corp. is hereby terminated, effective today's date.

Yours truly,

Bev Davey,
Packaging Foreman

cc:
W. Gerber
Unit Chairman - Local 1230
J. Galbraith

Ms. Black testified that upon receipt of that letter she was shocked and filed a grievance with her union against her dismissal. The grievance was referred to arbitration and the arbitrator denied the grievance and upheld the company's dismissal of Ms. Black.

Ms. Black testified that during the time following her dismissal, she did search for other employment positions but could not find a job in the geographic area in which she was able to travel. Mr. Begg testified that Ms. Black looked for work following her dismissal in January, 1986. He testified that most of the time they had two automobiles and that she was both available and able to work.

COMMISSION'S ARGUMENT

The Commission argues that section 9(1)(b) of the Code defines handicap for purposes of this hearing. That section of the Ontario Human Rights Code is as follows:

> 9(1)(b) "Because of handicap" means for the reason that the person has or has had, or is believed to have had or has had,
>
> (i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of foregoing, including diabetes, mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device.

The Commission stated that although there were no decisions within the province of Ontario on the subject matter of the instant case, nonetheless cancer should be considered as a protected item within section 9(ii)(b) of the Code. It argued that Dr. DePetrillo gave evidence that if cancer of the cervix went untreated, the prognosis would be death; however, such cancer can be successfully treated. In the Commission's view, successful treatment does not mean that it is not a handicap. The Commission also argued, based on Dr. DePetrillo's evidence, that there are effects which follow surgical treatment for cervical cancer and the effects can be traumatic. In addition, it was the Commission's argument that although cancer of the cervix is a common ailment, including it as a handicap, pursuant to the Code, would not denigrate the high purposes of the Code. In this matter, the Commission referred to Re: Darlene Ouimette v. Lily Cups Limited, Paul Sawyer and Al Gemottine (1990), 12 C.H.R.R. D/19.

The Commission argued that where a protected item is a factor in a decision, that decision can violate the Code. It is the Commission's position that if an employee, such as Jacqueline Black, was absent because of a handicap which is protected by the Code, that employee cannot be dismissed unless the employee cannot be accommodated or unless there is undue hardship in such accommodation. The Commission argues that if absence is not the result of, or related to a handicap, then the Code has no application. In the Commission's view, if there is a mix of reasons for illness, and the employer includes the handicap as one of those reasons, there will be a violation of the Code. The Commission argued that if the handicap or disability was a long time in the past, and a decision could be made without the handicap being counted, there would be no violation of the Code; however, if the handicap or disability was an influencing factor in a decision, then the Code has been violated.

The Commission argued that the letter of April 29, 1985 (supra) set forth conditions imposed on Ms. Black by the company as a direct result of her absence due to the operation for cancer. It is the Commission's view that the evidence shows that a significant portion of the number of days of absence from 1981 through 1986 was due to cancer and calculated that out of 373 days lost work in that period, approximately one-third was due to cancer related causes. In this respect, Counsel for the Commission referred to Vol. 5, p. 665 of the transcript in which Mr. Gerber was asked:

> "Q. So the conditions set out in this letter were imposed on Jacqueline Black in part because of her absences due to cancer?
>
> A. Yes."

In the Commission's view, the Respondent admits that the immediate cause of the conditions were the absence because of cancer and in the Commission's view, that in itself constitutes a violation of the Code. The Commission also argued that Mr. Gerber indicated that when the dismissal was put into effect in January, 1986, that the absence due to cancer was counted as one of the absences.

The Commission argued that the employer easily accommodated Ms. Black's absence since no one was hired to replace Ms. Black and that Mr. Gerber was unable to provide any concrete evidence of a shut down in production that could be directly attributed to Ms. Black's absence during the period when she was away for the cancer operation.

The Commission also argued that if the employer had violated the Code, one issue would be whether or not Ms. Black would have been dismissed in any event, at a later point, for a non-handicap related absenteeism. In this matter, the Commission referred to Dr. Haukioja's evidence. In the Commission's view, he indicated in a letter dated January 10, 1986, (Exhibit 6), that Ms. Black

would have a good prognosis in the matter of attendance. It is the Commission's view that a conclusion cannot be drawn, that Ms. Black would be anything other than an employee with a good attendance at the company. The Commission also argues that very little weight should be given to the evidence of Dr. Brown since the file of Ms. Black could not be found and his comments with respect to malingering were simply not borne out by any concrete evidence.

RESPONDENT'S ARGUMENTS

The Respondents argued that they were taking three positions: first, that there was no discrimination on the basis of handicap; second, that there is an issue of res judicata since the arbitration award dealt with the same fact situation and finally, that issue estoppel applies because Ms. Black did not take a position at the time the conditions were imposed, that she was being discriminated against. Related to these three, the Respondents argued that the employer had no duty to accommodate Ms. Black at the time because the Human Rights Code did not contain the section (Section 16), which contains the duty to accommodate without undue hardship. In addition, the Respondents argued that Ms. Black would have been dismissed in any event and finally that she did not make any attempt to mitigate her losses.

The Respondents argue that Ms. Black's absence for the cancer operation simply cannot forgive all of the other absences such that the employer would not be entitled to dismiss her. In addition, the Respondents argue that the absence for cancer was not a proximate cause for the discharge. It was not the culminating incident, in the jargon of labour relations, because her absence from the neck and shoulder injury was in fact the absence most closely associated with her dismissal. It is the Respondents' argument that the Commission's position is that the employer could have dismissed Ms. Black prior to 1984; however, once she had cancer, which the employer agrees is a handicap pursuant to the

Code, the employer would be prevented from dismissing her and in the Respondents' view, this does not fulfil the high purpose of the Code.

The Respondents' argue that there is no direct discrimination in this case and one must look at the nature of Ms. Black's disability, the duration of that handicap and if there was any recovery. In this matter, the Respondents argued that Ms. Black was given no differential treatment from other employees. The Commission in response to that, indicated that Ms. Black was not equal to all others and therefore equal treatment would in and of itself not be appropriate.

The Respondents argue that the Commission's strongest case is that the conditions established following her return to work in April, 1985, directly followed her absence from cancer. The Respondents indicated that there was no grievance lodged, nor was there any suggestion of a human rights complaint. The Commission in response, indicated that at the time, there was no discipline, rather, the principles of innocent absenteeism suggest that letters such as those given to Ms. Black were warning letters, not in a disciplinary sense, but as an indication that her absenteeism was no longer being tolerated. In addition, the Commission argued that there was no acquiescence or agreement from Ms. Black with respect to conditions, rather, she was in the position where she could not disagree. The employer argued that at the time the conditions were imposed, Ms. Black had union representation and there was full discussion.

With respect to the inclusion of cancer as a handicap within the Code, the Respondents argue that the Commission's position would indicate that an employer would have to forgive all such absences and that is clearly not fulfilling the high purposes of the Code.

The Respondents also argue that Ms. Black has shown bad faith.

She was given letters in 1985 with respect to her absences and conditions and yet no complaint was made pursuant to the Code until January, 1987. Ms. Black knew that the April 29, 1985 letter was important and raised no issue with respect to cancer or the need for accommodation.

The Respondents also argue that the issue is res judicata, but even if it is found not to be res judicata, the arbitration award should be persuasive. In the Respondents' view, the Arbitrator looked at the reasonableness of the employer's action and decided against Ms. Black.

It is the Respondents' argument that the most basic employment requirement, that of presenting oneself for work on a regular basis, has been violated by Ms. Black over the years of her employment. It argues that the employer did accommodate Ms. Black by allowing her to return to work each time without any disciplinary action or without terminating Ms. Black until January, 1986 when her absences had become intolerable. In the instant case, the Respondents argue that the accommodation is not one of tailoring the job to fit the individual who may have a handicap, but rather, accommodating the workplace in such a way so as to allow Ms. Black not to work. It is the Respondents' view that most cases dealing with handicap concern accommodation of the job to the individual. The Respondents argue that the only accommodation that could be made would be to forgive Ms. Black's absence and that this itself would work against the principles of the Code.

The Respondents argued that Ms. Black's work history is replete with absences for a variety of reasons and that, even if the absence for cancer was excluded, she has been absent approximately two and one-half years of the ten years that she has worked for the company.

With respect to whether or not Ms. Black could be expected to have

a more regular attendance after 1986, the Respondents note that Dr. Haukioja's letter, (Exhibit 16), in which he indicates that Ms. Black would be fit to return to work, and that the company should give her that opportunity, was not submitted before the arbitration board although the union was given every opportunity to do so. In addition, the Respondents argue that in his viva voce evidence, Dr. Haukioja admitted that he was overly optimistic about Ms. Black's ability to maintain good attendance and that Ms. Black had not kept the various appointments he had made for her with counsellors.

THE LAW

Both the Commission and the Respondents submitted cases for consideration. The law has been developing over a period of time with respect to treatment of individuals who have handicaps. In Re: Leslie Flamand v. Ann and Wing Nong Chow, doing business as "The Greenery Sandwich Bar" (1989), 10 C.H.R.R. D/6139, the complainant had Hodgkin's Disease, which is a form of cancer. This case was heard pursuant to the British Columbia Human Rights Act, S.B.C. 1984, c. 22. The complainant's employment was terminated and on the Record of Employment, the employer wrote that the termination was because of illness. The Adjudicator found that: "... Hodgkin's disease is a physical disability and was given as a reason for her termination." (para. 43979). The Adjudicator cited Ontario Human Rights Commission and Theresa O'Malley v. Simpsons Sears Limited (1985) 2 S.C.R. 536, 7 C.H.R.R. D/3102 indicating that the effect of an action rather than the action itself is significant.

Re: Ethel Quinlan v. Marina Restaurant Limited (1986), 7 C.H.R.R. D/3391, was a case heard pursuant to the British Columbia Human Rights Act as was the Flamand case. Ms. Quinlin had cancer of the mouth. At paragraph 27077, the Adjudicator states as follows:

> "Assuming, for the present, that the complainant had a physical disability as a result of cancer, the onus of proof in these cases is such that the complainant must first establish that she was refused continued employment and that the cancer was a "factor" or "a proximate cause" in or for that refusal. Thereafter, the onus shifts to the respondent."

That case did not answer the question of whether cancer was a physical disability. The Adjudicator also concluded that there was insufficient evidence to find that cancer was a factor which influenced the respondent's conduct, (para. 27094).

In Re: Maren Engell v. Mount Sinai Hospital and B.J. Lanigan-Gilmour (1990), 11 C.H.R.R. D/68, the complainant had multiple sclerosis (MS) and missed a considerable amount of time as a result of MS and pregnancy-related nausea. There is no reported evidence of any other reasons for missed time. Ms. Engell wished to take a vacation and did not seek approval for the vacation period in advance of making travel arrangements. The hospital denied the complainant the opportunity to take a vacation. Ms. Engell took her vacation in any event and was subsequently discharged. The respondents took the position that Ms. Engell was not discharged for absenteeism but rather for insubordination given that she had taken her vacation. At paragraph 33, the Adjudicator found that Ms. Engell's disability: "... was in the minds of her hospital employers at the time they refused her vacation leave." The Adjudicator also concluded as follows:

> "... if the hospital made this decision to deny the holiday even partly because of Ms. Engell's disability, or her absenteeism record due to disability, this violates ss. 4 and 8 of the Code." (para. 32).

In Re: John Belliveau v. Steel Company of Canada et al (1988), 9 C.H.R.R. D/5250, the issue was a shoulder injury. This concerned the employer's duty to accommodate and the Adjudicator found that:

" A respondent cannot rely upon mere impressionistic evidence that a person cannot perform the essential functions of a job." (para. 39571). In that case, one issue was whether or not the complainant had any responsibility to inform the employer of a medical condition. The Adjudicator found that the complainant, in fact, had contributed to the confusion over his medical status and that such confusion on the part of the complainant would have an impact on any remedies. In the instant case, one of the Respondents, Mr. Gerber, did not have statistical data concerning the impact of Ms. Black's absences on production.

In Re: Ontario Human Rights Commission and Theresa O'Malley v. Simpsons Sears Limited et al (supra), the issue was discrimination on the basis of creed. In that case, the Board of Inquiry found that discrimination could occur even if it was unintended. That case concerned a company rule regarding working on Saturday, which although reasonable from a business point of view, discriminated against Ms. O'Malley, a member of the Seventh Day Adventist Church. For her, work on a Saturday, would mean work on the Sabbath and as a result, she could not comply with what was otherwise a reasonable business rule. Such discrimination was adverse effect discrimination and involved a rule which apparently was non-discriminatory but which in fact was discriminatory. In the instant case, the Commission's view is that the rule for good attendance, while sound, nonetheless, discriminated against Ms. Black in the matter of the cancer operation.

In Re: Alberta Human Rights Commission v. Central Alberta Dairy Pool et al, a decision of the Supreme Court of Canada, (1990), the issue of undue hardship was canvassed. At pages 33-34 of the decision of the Court, Madam Justice Wilson indicated that some of the factors to be considered were financial cost, disruption of a collective agreement, morale of other employees, and interchange-ability of workforce and facilities. In the instant case, the Commission argues that the Respondents were unable to demonstrate

that Ms. Black's absence for cancer met any of these tests.

In Re: Irene Gohm v. Domtar Inc. (1990), unreported, a decision of a Board of Inquiry chaired by W.F. Pentney, the issue was discrimination on the basis of religion. In that case, the issue of undue hardship and reasonable accommodation was also canvassed and the Board of Inquiry found at page 52 as follows:

> "... the duty to accommodate short of undue hardship imposes a duty on employers (and as will be discussed later, trade unions), to take substantial or meaningful steps to accommodate the requirements of the complainant."

In Re: Shawna Dennis and Family and Childrens' Services of London and Middlesex and John Liston (1990), unreported, a decision of the Board of Inquiry chaired by C.B. Backhouse, the issue concerned the termination of employment of the complainant, who was pregnant and, who had requested maternity leave. In that case, as in the instant case, an arbitration hearing had occurred in which the arbitrator upheld the dismissal of the grievor, who was also the complainant in the Human Rights matter. The issue in front of the arbitrator was that Ms. Dennis was a probationary employee and pursuant to the collective agreement, did not have access to the grievance and arbitration procedure. The Board of Inquiry found that the arbitration award did not refer to the Human Rights Code in any way and also found that there was no issue of res judicata. The Board of Inquiry also found that the questions posed to the Board of Arbitration and the parties in front of the Board of Arbitration were not the same as that in front of the Board of Inquiry pursuant to the Human Rights Code. As a result, the Board of Inquiry found that there was no requirement for res judicata. At page 11 of the decision, the Board of Inquiry found that even if the elements for res judicata were present, Human Rights proceedings should not be stayed on the basis of a prior arbitration ruling because of the

different objectives of the two processes.

In Re: Glengary Industries / Chromalox Components and United Steelworkers, Local 6976 (1989), 3 L.A.C. (4th) (Hinnegan), the issue was the automatic termination of an employee pursuant to the terms of the collective agreement. One of the terms stated that if the employee was absent for six consecutive months, his or her employment shall be terminated. The grievor was in receipt of Workers' Compensation Benefits and the Human Rights Code includes Workers' Compensation cases within the definition of handicap. The Arbitrator found that the automatic termination clause violated the Human Rights Code. This is not the issue before the instant Board of Inquiry. There is no automatic termination article in the collective agreement between the union and respondent company, and as a result, the Glengary case is of little assistance. In Re: General Tire Canada Ltd. and United Rubber Workers, Local 536 (1986), 26 L.A.C. (3d) 95 (M.G. Picher), the issue was the remedy following reinstatement of a grievor. The grievor suffered from recurring anxiety attacks and Arbitrator Picher found that reinstatement with conditions should take account of the fact that, some absenteeism for anxiety was expected, and the reinstatement conditions would not be appropriate if such absences were not taken into account. This case would be of interest if Ms. Black had continued to experience absence due to cancer related activities; however, the evidence was quite clear that the cancer was removed surgically and her health was clear from a cancer related ailment.

In Re: Cindy Cameron v. Nel-Gor Castle Nursing Home and Marlene Nelson (1984), 5 C.H.R.R. D/2170, the issue was discrimination on the basis of physical handicap. The complainant had a deformity of her left hand and she was refused the position of Nurse Aide because the respondent employer felt that she would be unable to perform the requirements of the position. At paragraph 18467, the Board of Inquiry concluded that no dispute existed between the parties that, with the exception of the handicap, Ms. Cameron would

have been hired in a position of Nurse Aide. In the instant situation, Ms. Black was denied continued employment on the basis of handicap argues the Commission.

In Re: Darlene Ouimette v. Lily Cups Limited et al (1990), 12 C.H.R.R. D/19, the Board of Inquiry chaired by Dr. D. Baum, found that the flu (gastroenteritis), was not a handicap. The Board of Inquiry found at paragraph 67 as follows:

> "In my view, it would be wrong to attempt to stretch the meaning of illness under s. 9(b)(i) of the Code to include the flu. It would be wrong to do so, in part, because of the effect of such a construction on the high purpose otherwise achieved by the interpretation provision in protecting those who are actually or perceived to be materially impaired through illness. Where the Code calls for defining groups to be protected, the Commission would include literally everyone suffering from a few days illness. I cannot accept that the intent of s. 9(b)(i) is to embrace such kinds of discrimination."

Re: B.C. Timber Limited (Skeena Pulp Division) v. Pulp, Paper and Wood Workers of Canada, Local No. 4 (1983), 4 C.H.R.R. D/1557, concerns a labour arbitration involving a collective agreement which, in a Board of Arbitration's opinion, incorporated the Human Rights Code in the collective agreement. The grievor was complaining of discrimination on the basis of physical disability and one of the issues was whether the company had "reasonable cause for concluding that the grievor's disability created an increased risk of harm..." (para. 13491). At para. 13492, the Arbitration Board states:

> "The Board agrees that if management in arriving at its safety determination has made a reasonable decision which a reasonable person could have made which is within the law, then we should not overturn that decision or find it unreasonable merely because on our evaluation of the various factors, we would have reached a different conclusion."

In the instant case, the Respondent argued that no evidence is needed to establish reasonable cause for dismissal if the cause is so obvious. The Commission responded that the example given in B.C. Timber (supra), is found further in para. 13492 when the Board of Arbitration states: "For example, it goes without saying that an individual who is completely blind is unable to drive a truck safely."

In Re: Crouse-Hinds Canada Ltd. and United Automobile Workers (1981), 3 L.A.C. (3d) 320 (Brown), the issue was innocent absenteeism and the factors to be considered in dealing with such cases. At page 232, the Arbitration Board found that employers did have the right to dismiss an employee: "... who cannot provide reasonable and regular attendance at work in circumstances where the absenteeism is for proper reasons and without any blameworthy conduct on behalf of the employee." Similarly, in Re: Domglas Inc. and Aluminum, Brick and Glass Workers International Union, Local 203G (1988), 33 L.A.C. (3d) 88 (Dissanayake), the Arbitration Board noted two conditions which would justify dismissal for absenteeism. At page 95, the Board of Arbitration stated: "... first, that the grievor's absences are excessive and, secondly, that there is no reasonable likelihood that the grievor will be able to regularly attend in the future." In Re: Falconbridge Nickel Mines Ltd. and Sudbury Mine Mill and Smelter Workers Union, Local 598, (1982), 4 L.A.C. (3d) 274 (Saltman), similar findings were recorded; that is, the employer can expect an employee to have regular attendance. The Commission responded on this issue indicating that in Re: Falconbridge, notations with respect to irregular attendance were not disciplinary. Any conditions set by the employer were established unilaterally and would not bind a board of arbitration.

With respect to the test of future attendance, the Respondent submitted Re: General Tire Canada Ltd. and United Rubber Workers, Local 536 (1986), 26 L.A.C. (3d) 95 (M.G. Picher). In that case, a grievor had already been discharged and the board of arbitration

was establishing a remedy and was in the possession of medical documents indicating that the grievor's condition would, on average, require ten days absence per year and the Board took that into account when it established an attendance requirement.

In Re: Trudy Ann Holloway v Claire MacDonald and Clairco Foods Limited (1983), 4 C.H.R.R. D/1454, the issue was discrimination on the basis of sex and the complainant had been dismissed from her employment due to pregnancy. In that case, the respondent's duty to accommodate was based on the amount of time that an individual could be expected to be away because of a handicap or protected disability.

In Re: United Automobile Workers, Local 458 and Massey-Ferguson Industries Ltd. (1972), 24 L.A.C. 344 (Shime), the issue was discharge. The company in that case stated that the discharge was non punitive and based on the grievor's attendance record. That case stands for the proposition that a company first must establish undue absenteeism in the past and also that the grievor would be incapable of regular attendance into the future. The Arbitration Board indicated that an employer was entitled to look at a past performance and draw an inference to conclude about future performance. It is the Respondents' view in the instant case that Ms. Black's past record is sufficiently poor in the matter of attendance, that one can extrapolate that it would be poor in the future. The Respondents noted that Dr. Haukioja's letter, which indicated that she had "turned the corner" and would be capable of better attendance, is not any assurance of that attendance, especially since in his viva voce evidence he indicated that she had not pursued the counselling which he advised her to take.

DECISION

The issue, simply put, is did the Respondents discriminate against Ms. Black in violation of the Human Rights Code? In answering this

question, two other questions must also be answered, and they are: Was the Complainant's absence for cancer a proximate cause of her termination and was the absence due to cancer in the minds of the Respondents when Ms. Black was terminated? Also at issue is the matter of res judicata since there was an arbitration case between the same parties dealing with the same subject matter.

At the outset, there is no argument that the majority of Ms. Black's absence which began in November, 1984 and ended in April, 1985 was the result of treatment for cervical cancer. That in itself is not at issue. There is also no issue, based on the evidence, that the employer's letter, dated April 29, 1985 (supra, p. 5), was sent to Ms. Black following the absence due to cancer. The Respondents argued that the Commission's strongest case was the existence of the letter dated April 29, 1985 setting forth some conditions for Ms. Black to follow. That letter indicates, in the Commission's view, that the cancer was a proximate cause for the dismissal and as a result, is a violation of the Code. The letter of April 29, 1985 must be seen in its context before a ruling can be made on whether or not the cancer absence was a proximate cause. A review of that letter (supra, p. 5), demonstrates that Ms. Black's absentee record was noted from 1981 through April 26, 1985. Her absence from cancer is counted in the period in 1985; however, the letter is not directed at the cancer absence alone, rather at absenteeism in general. Also, as noted in the arbitration case following Ms. Black's dismissal, her absenteeism record was matter of grave concern since 1978. There is no dispute that Ms. Black was dismissed following her absence caused by a neck and shoulder injury. Originally, the Commission had sought to claim the neck and shoulder injury as an handicap, pursuant to the Code, but withdrew that allegation during the proceedings. The withdrawal of that allegation is significant for two reasons: firstly, the injury falls into a similar category as that in the Ouimette case (supra) in which large numbers of the population could suffer from a similar injury for a period of time, varying in length, and the

Code was not designed to protect that kind of injury. Secondly, the Commission's case would have been stronger had the dismissal followed immediately after a protected handicap.

This begs the question of the exact nature of Ms. Black's handicap and whether to be handicapped is the same as being absent. The Commission submitted a number of statements with respect to the serious nature of carcinoma of the cervix based on the evidence of Dr. DePetrillo. The evidence of Dr. DePetrillo is not challenged since he was never cross-examined; however, the various submissions by the Commission concerning the after effects of carcinoma of the cervix are not present in the instant situation. The Commission contends, without challenge, that if such carcinoma is not diagnosed and treated, death is the end result. Clearly, in Ms. Black's case, the carcinoma was diagnosed and treated. In addition, the Commission submitted that many patients have recurring or persistent cancer related problems following therapy after surgery and that the period of follow-up is two years. Dr. DePetrillo gave evidence that such after effects could occur; however, Ms. Black, in her evidence, did not indicate any suffering following the return to work in April, 1985 after her surgery. Ms. Black did not testify that she suffered persistent difficulty, related to the surgery which caused any absenteeism. Indeed, until the neck and shoulder injury took place, Ms. Black apparently did not have any significant medical difficulties. In the instant situation therefore, Ms. Black was diagnosed as having carcinoma of the cervix, surgery was performed and she was cured. The Commission argued that this should nonetheless indicate that an accommodation should be made, otherwise the position that would be taken would be than an employee who did not find a diagnosis for the illness and who experienced problems would have to be accommodated, whereas someone who was able to secure competent medical assistance would not have to be accommodated. With respect, that is not the position that need be taken. The effect of Ms. Black's cancer was a period of absence from work and after

she returned to work, cancer played no role, whatsoever, in any absenteeism.

The Commission also raised the point that if the absence for cancer was in the mind of the employer when it evaluated her total period of absenteeism, the entire response by the employer is tainted and is a violation of the Code. In this matter, the Commission cited Re: Maren Engell (supra). In that case, the complainant suffered from Multiple Sclerosis. She became pregnant and was diagnosed with hyperemesis gravidarum. In that case, the Board of Inquiry found that both conditions were handicaps within the meaning of the Code and when the hospital denied the complainant her vacation, these handicaps were both proximate causes and were in the minds of hospital at the time of the denial. In my respectful opinion, this is a different situation than in the instant case. In the instant situation, the Respondents imposed some conditions upon Ms. Black, based on her absenteeism, one time of which was her absence due to cancer surgery, but indicating that the absence in 1984-85 was the most recent in a long term absenteeism problem. It was only after the next series of absences, which had nothing to do with cancer, that Ms. Black's employment was terminated.

It is useful to use the tests explained in Re: Ouimette (supra) in connection with the instant situation. A reading of the Ouimette case indicates that, in defining whether a condition is a handicap within the meaning of the Code, one should look at the duration of the condition, especially whether or not it is ongoing and persistent, the severity of limitation which is caused by the condition, whether the person is part of an identifiable group and whether if indicating that the condition is an handicap would denigrate the high purposes of the Code. With respect to the last two points, the Complainant can be considered part of an identifiable group of persons since it is obvious that carcinoma of the cervix will only occur in females. In addition, indicating that cancer is a handicap would not denigrate the high purposes of

the Code. In the instant situation, the Respondents have not taken the position that cancer is not a handicap. At p. 809, volume 6 of the transcript, Ms. Pasieka indicated as follows:

> "...there will be no argument from the Respondents that cancer is not included in the definition of 'handicap' in section 9 of the Code."

The Ouimette tests therefore, are not used to determine if cancer is a handicap within the meaning of the Code, rather, to decide on how the single absence for cancer should be treated and accommodated. As a result, the first two tests indicated in the Ouimette case, that of duration and severity, should be addressed. In my respectful opinion, if Ms. Black had been dismissed immediately following her return from the cancer operation, the Commission's argument would have some validity because the absence for cancer would be the proximate cause for the dismissal. With respect to duration, a review of the evidence surrounding the diagnosis and treatment of the cancer indicates that in Ms. Black's case, the condition was neither ongoing nor persistent. It was in fact temporary, albeit of considerable duration. In addition, its severity was limited because of the procedure used and that is the surgery. Ms. Black, once her absence due to the cancer operation was over, was able to return to work without any apparent affects of the surgery or indeed of the medical condition. In fact, she proceeded to return to work until her vacation, with its attendant accident and neck and shoulder injuries. As a result, in this particular case, Ms. Black suffered a temporary condition, albeit serious, which once surgically corrected, presented no further problems for her work. This is different than the cases of Re: Engell (supra), or Re: Quinlin (supra), where the conditions were continuing and persistent. The issue of an ongoing condition or a persistent condition which affects the employee's ability to work has been addressed in at least two of the cases submitted for consideration by this Board of Inquiry. In Re: O'Malley (supra),

the issue was not medical. Rather, a company rule requiring work on Saturdays, which although sound in a business sense, when applied to one employee for whom the Saturday was the Sabbath, violated the Code. Quite properly, the Code was upheld and the rule was found to have an adverse affect even though it was not directed at a particular employee. There is a similarity with the instant case because the issue is whether a rule concerning attendance should be applied to Ms. Black. In Re: General Tire (supra), Arbitrator Picher set conditions for reinstatement and took into account a reasonable allowance for absenteeism due to a medical condition. In those two cases, the medical condition altered the work process: in the O'Malley case, the work schedule would have to be altered to accommodate the employee, T. O'Malley; and in the latter case, the employer was told that certain absences would have to be accommodated. In the instant case, the employer could not anticipate any alteration of the work process. Ms. Black was simply absent for a period of time while undergoing a surgical procedure. In the instant case therefore, an absence took place and it was one of a long line of absences which Ms. Black had throughout her employment.

This brings the Board of Inquiry to the issue of the letter dated April 29, 1985 (supra p. 5). The question that is raised is whether or not that letter in and of itself, indicates that Ms. Black is either being treated differently than all others because of her cancer absence and/or whether that letter is in itself a violation of the code since the setting of the conditions follow an absence due to cancer. In my respectful opinion, the strongest case for the Commission rests on the delivery of the April 29, 1985 letter. It is noteworthy that Ms. Black was neither disciplined nor was her employment terminated at that point. Rather, it is clear from a reading of the letter (supra p. 5), that Ms. Black was being counselled and warned about her absenteeism. If the Company had not taken the cancer absence into effect, it is my respectful opinion that the letter could have been issued in any event. That

it was not, places the letter in close proximity, indeed immediately following a return from the absence due to cancer. It is also noteworthy that the Company takes no further action until Ms. Black is absent once again, for forty days during the period from May 1, 1985 until January 6, 1986, when her employment was terminated. Had the employer taken the cancer absence out of its letter, this case would not have proceeded under the Code. That it took the cancer related absence into account in the context of all other absences is important only in so far as it triggered a set of conditions.

This begs the question of whether a physical disability or handicap is the same as being absent. In Re: Flamand (supra) the complainant had Hodgkin's Disease and required time away from work on various occasions. The evidence also indicated that she was not a particularly competent employee. However, when discharging the complainant, the respondent employer indicated that she was being discharged for illness. Because the reason for the termination was stated as illness, the Board of Inquiry found that it was: "a factor in the termination of employment" (para. 43979). In the Flamand case, the complainant could not control her absences because of the nature of the condition. In the instant case Ms. Black had one period of absence and there were no further absences due to cancer. It should also be noted that the Commission drew a distinction between a non-protected handicap and a protected handicap. The Commission directed the Board of Inquiry's attention to Re: General Tire and Re: Glengary Industries (supra) in this regard. There is no question that in Re: General Tire an accommodation was made for an employee's ongoing medical condition. Re: Glengary however, in my respectful opinion, does not advance the Commission's case. In Re: Glengary the issue was the operation of an automatic termination clause following a certain period of absence and the arbitrator found that the automatic termination clause violated the Code. Because of the automatic termination clause, the employee did not have the same right as others to

challenge a termination. The arbitrator found therefore that the employee had unequal treatment. In the instant case, the Respondent did not terminate the employment of Ms. Black at the end of the absence for cancer, rather the employment termination took place almost seven months later, following a forty day absence for other unrelated causes. In any event, in Re: Glengary, the merits of the situation were not before the arbitrator and at page 332 the arbitrator states that the arbitral standards and principles applicable to innocent absenteeism were not placed before him.

This brings the Board of Inquiry to the arbitration case in the instant matter. When Ms. Black was dismissed by the company, the matter was brought before Arbitrator Solomatenko who reviewed the exact issue that has been placed before the present Board of Inquiry. Although the Respondents asked the Board of Inquiry to find that the matter is res judicata, with respect, the Board does not have to go that far. There is authority for separating the Labour Arbitration Process and the Human Rights Process; however, an arbitration case which precedes a Human Rights case and in which the exact issues are canvassed, must serve as a guide, at least. In the instant case, Arbitrator Solomatenko was given absence data going back to 1978 and found that the evidence demonstrated that one could not draw a conclusion that the absenteeism rate would improve in the future. There was some dispute with respect to the letter from Dr. Haukioja concerning Jacqueline Black, dated January 10, 1986 which was entered as Exhibit 16 in these proceedings. That letter was tendered at the arbitration hearing; however, the evidence of Mr. Williams was that the union felt that the letter was sufficient and Dr. Haukioja was not called as a witness at the arbitration hearing. Mr. Gerber testified that the union asked to have the doctor's letter submitted into the evidence and company counsel objected unless the doctor was called as a witness. It was Mr. Gerber's evidence that the company was prepared to adjourn the hearing so that the doctor could be called. Mr. Williams confirmed that in his evidence, but indicated the union decided not to seek

an adjournment. Mr. Gerber's recollection is that the letter from Dr. Haukioja was not placed in evidence at the arbitration hearing; however, Mr. Williams thought it was introduced. There was no specific mention of it in the arbitration award (Exhibit 7). The letter would appear to indicate that Ms. Black's health problems were being controlled.

This now begs the question of how to treat the absence due to cancer and how, if the Respondents had known that cancer was a handicap within the Code whether an accommodation could have been made. First, the employer was given no indication of any Human Rights violation. In Re: Belliveau (supra), the complainant had a physical disability and was not permitted to return to work because of his handicap. At paragraph 39607, the Board of Inquiry states as follows:

> "In my opinion, a disabled person in Mr. Belliveau's position must effectively communicate that he clearly believes he is capable of doing the essential requirements of the job. An employee cannot simply remain silent when decisions are made in good faith that affect his interest, and say later that the company failed to take initiatives."

In the instant situation, Ms. Black was represented by her Union at a meeting held in April, 1985 following receipt of the letter dated April 29, 1985. At no time was the mention of handicap made and indeed, the Human Rights complaint was not filed for almost two years - January, 1987. There is also no indication in the arbitration case which was held in February, 1986 after Ms. Black's employment was terminated, that the Human Rights Code was involved. Surely it is incumbent upon an individual who is suffering from a condition which prevents attendance at work to indicate to the employer that some accommodation should be made.

The case of Ms. Black is a complex matter although at first it

seems to be a very simple matter. In its most simplistic form, Ms. Black was absent due to cancer from sometime in November, 1984 until sometime in April, 1985. This absence is one of a series of absences for various causes dating back to 1978, presented at the arbitration case, and 1981 as noted in the letter dated April 29, 1985. Following that letter, Ms. Black was absent for another forty days immediately prior to the termination of her employment. The employer put the absences into a context of overall absenteeism and did include the absence for cancer in that list. It would be grossly unfair of the employer not to advise Ms. Black that there was a problem with her attendance at work. Indeed, there could be an allegation of denial of natural justice if the employer suddenly informed Ms. Black that her employment was terminated. The Commission argues that even if one of the considered absences was a protected handicap under the code, the entire process is tainted. With respect, the cases submitted, especially Re: Engell and Re: Flamand demonstrate that the protected handicap must be a proximate cause or indeed be the immediate cause of the difficulty. In the instant case, the cancer related absence was the immediate cause of the letter informing Ms. Black of her absence problem and only requiring her to be a more attendant employee and setting forth conditions. If the Commission's argument is taken to its logical conclusion, there would be an absurdity created. In my respectful opinion, that does not fulfil the high purposes of the code. In Re: Engell and Flamand, the conditions were directly responsible for the employer's decisions. In the instant case, if the Commission's argument is to hold, these Respondents would not be able to dismiss Ms. Black at any time because the cancer absence could never be erased from her record. The absence is a fact, it is documented and she was absent. It must be borne in mind that this case is different from the cases submitted in which a work process had to be changed to accommodate a person's handicap or that some absences from work, because of a handicap, would have to be accommodated. In the instant situation, the employer's decision did accommodate the absence due to cancer. The employer did not

dismiss Ms. Black following her return to work after the cancer absence, rather, it waited to see if the pattern of absenteeism, already established, continued. The employer does not have to pretend the absence did not exist.

In the instant case, if the Respondents are to receive any criticism, it would be in the setting of conditions in April, 1985. However, in my respectful view, that letter and the conditions are not, in themselves, a violation of the Code. The employer did not include statements in its letter that it had taken only the non cancer-related absences into account and recognized that the cancer related absence was protected under the Code. Surely given Ms. Black's interests and her representation by her union, the employer could have been forewarned. It could be argued that Ms. Black did not know that cancer was a protected handicap under the Code. However, in this case, the employer and the union also must not have known. In any event, nothing flowed from the April 29, 1985 letter except that Ms. Black was being told that her absenteeism had to decrease or she would suffer termination of employment. Although it was not a culpable incident, Ms. Black did have the right to grieve the warning letter since it was warning her that if her absenteeism did not improve, she would be dismissed. There was no reason why she could not have grieved the inclusion of the cancer absence as part of that whole process and there is also no reason why she could not have grieved her entire record, or the conditions imposed, indicating that she was being treated differently from other employees. She did neither. This lack of response was noted by the arbitrator (p. 6 of the award - Exhibit 7). As a result, if the employer is to be held accountable for the wording of its letter in April, 1985, Ms. Black must also be held accountable. In my respectful opinion, that letter and the meetings that followed, are not in themselves, violations of the Code; however, it is also clear from the evidence that no action was taken at that time. There would be a potential violation of the Code, only if action was taken immediately following the cancer

absence and that was the case in Re: Engell and Re: Flamand (supra). In the instant situation, the employer gave Ms. Black time to improve her absenteeism record or in other words, the employer accommodated Ms. Black.

As a result, I find that the Respondents did not discriminate on the basis of handicap in the matter of Ms. Black. Ms. Black was treated like any other employee who had a long history of absenteeism, she was notified of the employer's concern. What is different about this case is that one of the absences is, by the Respondents' admission, protected by the Code. There are a variety of ways to approach a final determination on this matter.

Firstly, if the employer is to be held to a strict accounting of the absence related to cancer, as suggested by the Commission, the Respondents could never discharge Ms. Black because one of the absences would always be the absence due to cancer. That absence cannot be expunged because it in fact happened, it is well encapsulated and it forms part of a long history of absences for various reasons.

Secondly, if that absence were in and of itself, the proximate cause or the direct cause of discharge, a violation of the Code could be found; however, the facts point in the opposite direction. The termination of Ms. Black's employment followed an absence of approximately forty days because of a neck and shoulder injury. Given the past record of absences, for a variety of reasons, only one of which was related to cancer, one could easily find that this Complainant was unable to present evidence that would give anyone assurance that she could be an attendant employee in the future.

Thirdly, the letter of April 29, 1985 is not in and of itself a violation of the Human Rights Code. That letter, albeit setting conditions for continued employment, relates to all of the absences of Ms. Black. The employer did show that it was willing to

accommodate Ms. Black's absences in that it did not discipline her nor did it dismiss her from employment because of absenteeism up to the point of April 29, 1985. Indeed it did accommodate Ms. Black's absences and in particular accommodated her absence due to cancer. Once the absence due to cancer was finalized, the employer had the right to expect an attendant employee. That did not occur.

Fourthly, if the letter of April 29, 1985 was itself a violation of the Code, does that negate the dismissal of Ms. Black? In my respectful opinion it does not. Although the letter set forth conditions indicating that Ms. Black had to maintain a regular attendance, the decision is based not on the cancer related illness, but on "...the next twelve (12) months of your employment ...." (supra p. 5). In other words, the Respondents started almost anew and looked at the twelve months beginning May 1, 1985 and indicated that Ms. Black would have to maintain a level of attendance that was equal or better than the plant average or her employment would be terminated. Indeed, the termination letter states that beginning May 1, 1985 the average absenteeism of her co-workers was 6.5 days whereas Ms. Black was absent from June 17th to June 21st, and again from November 4th until her dismissal, for a total of forty days. (supra p. 8) The dismissal makes no mention of the cancer related absence and indeed the conditions set forth relate to the period following the cancer. It must be admitted that the absence for cancer triggered that discussion; however, a review of Ms. Black's full absenteeism record, even with the cancer absence removed, would indicate that the employer was justified in its decision.

For all of the above reasons, the Board of Inquiry comes to the following conclusions: 1) That these Respondents did not violate the Code and did not discriminate against Ms. Black on the basis of handicap; 2) To remove the cancer related absence from overall consideration of an absenteeism record is not fulfilling the high purpose of the Code; 3) That if the cancer related absence had

been the cause of the termination, or a proximate cause of the termination, the Respondents could have violated the Code; 4) That the employer dismissed Ms. Black for failure to maintain a reasonable absenteeism record in the period following her return to work after the cancer related absence; 5) That the only possible violation of the Code would be found in the letter setting forth the conditions; however, those conditions were appropriate even if the cancer related absence is removed and I so find.

As a result, the complaint is hereby dismissed.

Graeme H. McKechnie

April 28, 1992